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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937. No. 45.

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased, *Petitioners,*

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. COOMBE, ROY UPDEGRAVE, ALVARETTA UPDEGRAVE, Administratrix of the Estate of R. R. UPDEGRAVE, Deceased, and MARGARET WILKINSON, Administratrix, d. b. n. c. t. a. of the Estate of B. C. GULDIN, Deceased, *Respondents.*

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	8
1. The Denial of the Right to Contribution in the Present Case Results in Imposing on One Stockholder of a Liquidated Corporation who has been Compelled to pay Deficiency Income and Profits Taxes of the Corporation by Proceedings Under Section 280 of the Revenue Act of 1926, the Full Burden of the Liquidated Corporation's Tax Liability	8
2. The Denial of the Right to Conribution in the Present Case is Inconsistent with the Previous Decisions on this Very Point Rendered in the Proceedings by the Commissioner of Internal Revenue Against Phillips Alone	10

PAGE

3. The Denial of the Right to Contribution is Based on a Fundamental Misconception of Section 280 of the Revenue Act of 1926. That Section Provides Merely a New Method for Enforcing the Stockholders' Preexisting Liability 12

4. The Denial of the Right to Contribution is Based on a Fundamental Misunderstanding of the Doctrine of Contribution. It, in Effect, Restricts the Doctrine to Cases Between Parties Adjudged Liable for the Same Obligation 16

TABLE OF CASES.

PAGE

Friedman *v.* Maltinsky, 260 Pa. 312 9

Hatch *v.* Dana, 101 U. S. 205 18

Hatch *v.* Morosco Holding Co., 50 Fed. (2d) 138 ... 14

Leighton *v.* U. S., 289 U. S. 506 14

Liquidators of Exchange National Bank of Shreveport *v.* U. S., 65 Fed. (2d) 316 15

Phillips, *et al.*, Executors *v.* Commissioner, 283 U. S. 589 ..... 2, 3, 8, 11, 14

Phillips *v.* Commissioner, 42 F. (2d) 177 10

Pierce *v.* U. S., 255 U. S. 398 13

Power *v.* Rees, 189 Pa. 496 9

STATUTES CITED.

Revenue Act of 1926, sec. 280, 44 Stat. 61 12

Revenue Act of 1936, sec. 311, 49 Stat. 1729 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937. No. 45.

Phillips-Jones Corporation, Individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors Under the Will of I. L. Phillips, Deceased,

Petitioners,

v.

C. S. Parmley, C. H. Parnell, Effie E. Scott, I. A. Coombe, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix, d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased,

Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania filed April 16, 1936, is printed at Record, page 18, and is not reported.

The opinion of the District Court for the Eastern District of Pennsylvania Sur Motion for Re-argument filed July 7, 1936, is printed at Record, page 29, and is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit filed March 2, 1937, is printed at Record, page 36, and is reported in 88 F (2d) 958.

The opinion of the Supreme Court of the United States filed May 25, 1931, in the correlated case of *Phillips, et al, Executors* v. *Commissioner of Internal Revenue,* is reported in *283 U. S. 589.*

The opinion of the Circuit Court of Appeals for the Second Circuit filed June 9, 1930, in the same matter, is reported in *42 Fed. (2d) 177.*

JURISDICTION.

The final decision of the Circuit Court of Appeals of the Third Circuit was rendered March 2, 1937.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936.

STATEMENT OF THE CASE.

In 1919 a corporation known as The Coombe Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its stockholders in proportion to their holdings (R. 4).

In 1924 and 1925 the Commissioner of Internal Revenue assessed against The Coombe Garment Company additional income and profits taxes for years 1918 and 1919 in the total sum of $9,402.43 (R. 5). The corporation, which had no assets left, paid only a few dollars of this tax. In 1926 the Commissioner of Internal Revenue, pursuant to Section 280 of the Revenue Act of 1926, proposed an assessment against I. L. Phillips, one of the principal stockholders of the company, for the full amount of the unpaid taxes (R. 5).

The executors of I. L. Phillips, who had died, vigorously fought the tax claim on the grounds, first, that the tax was not due from the corporation, second, that Section 280 of the Revenue Act of 1926 was unconstitutional and, third, that I. L. Phillips was only liable in proportion to his stock holdings. The matter finally came before this Court and was decided adversely to the executors (R. 6). This case is reported as:

> *Phillips, et al, Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589.*

After this decision the Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the taxes with interest and costs and also paid the legal fees incident to the prosecution of the case (R. 6). Phillips' executors and the Phillips-Jones Corporation then brought the present bill in equity against other stockholders of the cor-

poration seeking contribution from them in proportion to their holdings.

A motion to dismiss the bill for want of equity was filed (R. 17-18) and on April 16, 1936, the District Court for the Eastern District of Pennsylvania dismissed the bill on the ground that liability for the taxes arose solely from assessment under Section 280 of the Revenue Act of 1926 and that the respondent stockholders had never been assessed for the taxes, and were not liable in any way, therefore, and accordingly were not liable to contribute to Phillips and Phillips-Jones Corporation in relief of the obligation imposed upon them (R. 18-21).

Petitioners sought a rehearing in the District Court for the Eastern District of Pennsylvania (R. 22-27) and the court reaffirmed its position (R. 29-31). From the decree dismissing the bill (R. 31) your petitioners appealed to the Circuit Court of Appeals for the Third Circuit and the latter, on March 2, 1937, affirmed the judgment and decree of the District Court (R. 38). As we understand the Circuit Court's opinion, it holds; first, that no liability for the taxes existed until assessment under Section 280 of the Revenue Act of 1926; and, as the respondent stockholders were never assessed, they were not liable for the taxes and could not be compelled to contribute therefor; second, that to force these stockholders to contribute would constitute a new method for imposing tax liability not provided by the Revenue Act; third, that contribution could not be enforced against stockholders severally liable for taxes unless they

were assessed with the amount thereof or were adjudged liable by formal judicial proceedings at the instance of the Commissioner.

On June 1, 1937, this Court granted certiorari to review the decision of the Circuit Court of Appeals.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation, was not entitled to contribution from other stockholders.

2. In holding that stockholders of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) were not liable in contribution for deficiency income and profits taxes of the corporation until assessment therefor had been made against them by the Commissioner of Internal Revenue.

3. In holding that to permit one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation to obtain contribution from the other stockholders,

would constitute an unwarranted judicial extension of the methods prescribed by Congress for imposing tax liability.

4. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation could not compel the other stockholders to contribute unless their liability for the taxes had previously been established by judicial proceedings at the instance of the Commissioner in the courts or under Section 280 of the Revenue Act of 1926.

5. In holding that petitioners' bill seeking contribution should be dismissed in the following language:

> "The decree of the District Court dismissing the bill in equity is affirmed." (R. 38.)

and by the following decree:

> "* * * it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs." (R. 38.)

SUMMARY OF ARGUMENT.

1. The denial of the right to contribution in the present case results in imposing on one stockholder of a liquidated corporation who has been compelled

to pay deficiency income and profits taxes of the corporation by proceedings under Section 280 of the Revenue Act of 1926, the full burden of the liquidated corporation's tax liability. It bars the only means such stockholder has to make other stockholders bear their fair share of the burden.

2. The denial of the right to contribution in the present case is inconsistent with the previous decisions on this very point rendered in the proceedings by the Commissioner of Internal Revenue against Phillips alone.

3. The denial of the right to contribution is based on a fundamental misconception of Section 280 of the Revenue Act of 1926. That section provides merely a new method for enforcing the stockholders' pre-existing liability. It does not impose any new liability. A misconstruction of the statute in this respect has led to the present error and may well lead to other errors.

4. The denial of the right to contribution is based on a fundamental misunderstanding of the doctrine of contribution. It, in effect, restricts the doctrine to cases between parties adjudged liable for the same obligations. The doctrine is broader than this and was designed to permit the adjustment of equities between parties liable for the same obligation regardless of whether they have been adjudged liable or not.

ARGUMENT.

1. The Denial of the Right to Contribution in the Present Case Results in Imposing on One Stockholder of a Liquidated Corporation who has been Compelled to Pay Deficiency Income and Profits Taxes of the Corporation by Proceedings Under Section 280 of the Revenue Act of 1926, the Full Burden of the Liquidated Corporation's Tax Liability.

We should like to emphasize at the outset the grave injustice of the present decision of the Circuit Court of Appeals. Under the decision of this Court in:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

it was recognized that the Commissioner of Internal Revenue could proceed by assessment to collect the full amount of The Coombe Garment Company's taxes from one of the stockholders, namely, petitioner, Phillips. It was also recognized that Phillips could not join and the Commissioner of Internal Revenue was not required to join the remaining stockholders in that proceeding and compel them to pay their fair share of the taxes (See 283 U. S. 589, 603). It was conceded by this Court that if the Commissioner of Internal Revenue had sought to collect the taxes from Phillips by a bill in equity, he could have joined the respondent stockholders and made them bear their fair share of the burden. This Court, however, held

that such joinder could not be tolerated in a summary proceeding by assessment.

Phillips' executors were, accordingly, obliged to fight the assessment proceeding alone and were relegated to an independent action of contribution against the remaining stockholders. The decision of the Circuit Court of Appeals in the present case bars even this right. It, therefore, unequivocally holds that if the Commissioner of Internal Revenue proceeds against one stockholder under Section 280, that stockholder has no redress whatsoever against the other stockholders to compel them to pay their fair share of the taxes.

The right to contribution is based upon the payment of a common burden which others are equally bound to bear.

Power v. *Rees, 189 Pa. 496;*
Friedman v. *Maltinsky, 260 Pa. 312.*

The denial of the right to contribution in this case imposes upon the stockholder who has paid the obligation of the corporation, the entire burden of an obligation for which he was liable only in common with all other stockholders.

The manifest injustice of this decision is apparent. In fact, it was conceded both by the District Court and the Circuit Court of Appeals. (See opinion of the District Court, R. 20; see opinion of the Circuit Court of Appeals, R. 37.) The decision is also in conflict, we believe, with the law as established by the decisions of this Court and the Circuit Courts of Appeals for the other circuits.

2. The Denial of the Right to Contribution in the Present Case is Inconsistent with the Previous Decisions on this Very Point Rendered in the Proceedings by the Commissioner of Internal Revenue Against Phillips Alone.

The basic ruling of the Circuit Court of Appeals denying the right of contribution is in direct conflict with the prior decisions of this Court and the Circuit Court of Appeals for the Second Circuit in the proceedings against petitioner, Phillips.

When the correlated case was in the Circuit Court of Appeals for the Second Circuit, it was urged that Phillips was only liable in proportion to his stock holdings. While the Court overruled this contention, it was, we believe, careful to point out that this was no hardship to Phillips since he could compel contribution from the other stockholders by an independent suit. The Court said, *Phillips* v. *Commissioner, 42 F (2d) 177, 180:*

> "'* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., Sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation has been discharged, **if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution;** but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors.' Page 589 of 57 N. Y.

> "'* * * The defendant, Drew, is found to be in possession of assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it.'' Page 591 of 57 N. Y.'' (Boldface ours.)

When this decision came before this Court, in *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,* it affirmed the decision of the Circuit Court of Appeals and said p. 604:

> "The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholder. There is nothing in Sec. 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.''

While this Court did not expressly pass on the contribution point, we very earnestly submit that its affirmance was based upon an assumption that Phillips could compel the other stockholders to bear their fair share of the corporation's tax liability by independent suit. This seems very apparent if this Court's opinion is read in the light of the decision of the Circuit Court of Appeals.

The decision in this case is, therefore, we believe, clearly erroneous, because it is inconsistent with the decisions just noted.

3. The Denial of the Right to Contribution is Based on a Fundamental Misconception of Section 280 of the Revenue Act of 1926. That Section Provides Merely a New Method for Enforcing the Stockholders' Preexisting Liability.

Not only is the ultimate ruling of the Court below erroneous and conflicting, but an examination of the reasons assigned for the holding reveal further error and conflict. The Circuit Court of Appeals in this case proceeded on a fundamental misconception of Section 280 of the Revenue Act of 1926 (now Section 311 of the Revenue Act of 1936).

The pertinent portions of Section 280 read as follows:

> "(a) The amounts of the following liabilities shall * * * be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *
>
> "(1) The liability, at law or in equity, of a transferee of property of a taxpayer in respect of the tax * * * imposed upon the taxpayer by this chapter or by any prior income, excess profits or War Profits Tax Act."

It seems reasonably apparent that this section does not create liability. It has long been recognized that when a business corporation winds up and distributes its assets among its stockholders they are, as a matter

of general law, liable to unpaid corporate creditors to the extent of the assets received by them. This generally recognized liability is based upon the old doctrine that corporate assets are a trust fund for creditors. In this connection see:

Pierce v. United States, 255 U. S. 398.

The stockholders are liable for Federal taxes in the same manner and to the same extent as they are liable for other unpaid corporate debts. Section 280 did not add to or subtract from that liability. It merely imposed a new method for enforcing that liability in tax cases (Phillips, *et al. v.* Commissioner, 283 U. S. 589, 594). Both the District Court and the Circuit Court of Appeals misunderstood this. They assumed that stockholders of a liquidated corporation were not as a matter of general law liable for its debts under any circumstances and then held that Section 280 created a new liability. This error is manifest from the following statements.

The District Court said *(Rec. p. 31)*:

> "The thought that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

The Circuit Court of Appeals said *(Rec. p. 37)*:

> "Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commission prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability."

This holding that the stockholders of a liquidated corporation are rendered liable for corporate taxes solely because of assessment under Section 280, is at variance with practically every other case which has had occasion to construe that section. These cases recognize that Section 280 has merely created a new mode for enforcing a preexisting liability.

This was clearly indicated in the decision of:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

and also in:

> *Leighton v. United States, 289 U. S. 506.*

It has been repeatedly pointed out by other Circuit Courts of Appeal.

> *Hatch* v. *Morosco Holding Co., 50 Fed. (2d) 138 (C. C. A. 2).*

Here the Circuit Court of Appeals for the Second Circuit said, *page 139:*

"The order appealed from allows the United States to prove as a claim against the receivership taxes assessed against Morosco Holding Company under section 280 of the Revenue Act of 1926 (44 Stat. 61 (26 USCA Sec. 1069)), the validity of which this court sustained in Phillips *v.* Commissioner, 42 F. (2d) 177, pending on certiorari in the Supreme Court, 51 S. Ct. 82, 75 L. Ed.—. That section imposes no new obligation upon the transferee of property of a taxpayer, but it permits collection from him, by a summary procedure, of taxes owed by the transferor, to the extent that the municipal law makes him liable at law or in equity for the transferor's taxes. See United States *v.* Updike, 281 U. S. 489, 493, 50 S. Ct. 367, 74 L. Ed. 984; Phillips *v.* Commissioner, *supra;* Wire Wheel Corp. *v.* Commissioner, 16 B. T. A. 737, affirmed by this court 46 F. (2d) 1013."

Liquidators of Exchange Nat. Bank of Shreveport v. United States, 65 Fed. (2d) 316 (C. C. A. 5).

Here the Circuit Court of Appeals for the Fifth Circuit said, *page 316:*

"This section 'provides the United States with a new remedy for enforcing the existing "liability, at law or in equity"' of a transferee. Phillips *v.* Comm., 283 U. S. 594, 51 S. Ct. 608, 610, 75 L. Ed. 1289. It does not create or impose an obligation not already fixed by municipal law. It merely provides a summary remedy for its direct enforcement. Phillips *v.* Comm. *supra.* Hatch *v.* Morosco Holding Co. (C. C. A.) 50 F. (2d) 138."

We believe the misconception of Section 280 is largely responsible for the error in the present case and may lead to great confusion in the future. A proper recognition that the liability of stockholders is dependent on general law renders a great body of decisions involving the rights of creditors of corporations applicable to tax matters. Numerous complicated questions which may arise can be adjusted in the light of these prior decisions. However, if Section 280 is construed as creating a new liability, this body of law is rendered inapplicable. The present case is but one example of the anomalous results which such an error will foster.

4. The Denial of the Right to Contribution is Based on a Fundamental Misunderstanding of the Doctrine of Contribution. It, in Effect, Restricts the Doctrine to Cases Between Parties Adjudged Liable for the Same Obligation.

While the misconstruction of Section 280 would seem to be primarily responsible for the decision in this case, the Circuit Court of Appeals also seems to suggest that, conceding all the stockholders were liable for the taxes under the trust fund theory, one stockholder who has been obliged to pay the taxes in full cannot force the other stockholders to contribute unless their liability for the taxes has previously been established in judicial proceedings instituted by the Commissioner of Internal Revenue. The Court said *(Rec. p. 37)*:

> "The right to contribution is of necessity dependent upon a prior determination that the appelles are liable for the corporation deficiency tax. * * * In the absence of assessment against the several appelles by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

In other words, they suggest that contribution can only be enforced to adjust equities among persons who have been adjudged liable for the same obligation. This would in most cases destroy the right of contribution. Let us take the simplest case and imagaine that two debtors have signed a joint and several note for their obligation. Under such circumstances, the creditor is at liberty to enforce collection from either or both of his option. If the creditor elects to collect from one only by an action against him, this case holds that the other joint debtor cannot be compelled to contribute in relief of his co-obligor. It holds that one joint obligor cannot compel the other to contribute unless the latter has been adjudged liable for the joint obligation by a court of record. This is a most unfortunate holding.

The Circuit Court of Appeals seeks to justify the holding by suggesting that unless the liability of respondent stockholders has been established by a judicial proceeding, they will have no opportunity to assert their defenses in court. This is not so. The remaining stockholders will have an opportunity to

set up their defenses in the present action for contribution. They can defend this action on any fair ground and will have full opportunity to contest their liability and the amount thereof.

The decision in this respect is contrary to the well settled doctrine of contribution and contrary to the rulings of this Court. In this connection see:

Hatch v. *Dana, 101 U. S. 205.*

In this case a creditor of a corporation brought a bill in equity against some but not all of the stockholders of the corporation seeking to collect his debt out of the unpaid stock subscriptions of these stockholders. The stockholders joined contended that all the stockholders should be parties defendant. This contention was overruled by the lower Court which entered a judgment against the stockholders who were made parties for the full amount owed by them on their unpaid subscriptions. This amount was more than sufficient to satisfy the complainant's debt. When the case came before this Court it was again contended that all the stockholders should have been joined as defendants. This Court overruled the contention and pointed out that the creditor was not concerned with adjusting the equities between the stockholders. The Court went on to point out that if the stockholders who had been made parties to the bill had desired to do so, they could have brought a cross-bill joining all the other stockholders as parties and compelled them to bear their fair share of the

burden. It further held that even though the other stockholders had not been joined and adjudged liable, the defendant stockholders could compel contribution by a separate action. The Court said, *page 214:*

> "We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock supscriptions. **Their equitable right to contribution is not yet lost.**" (Boldface ours.)

For the reasons stated, it is submitted that the decision of the court below is erroneous. We ask that its decree dismissing the amended bill of complaint should be reversed, and that the motion to dismiss the amended bill of complaint should be overruled.

Respectfully submitted,

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